Filed 3/21/16 P. v. Darden CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL TRAVIS DARDEN, JR., Defendant and Appellant.	F069388 (Super. Ct. No. VCF275495B) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

At the conclusion of a jury trial on March 5, 2014, defendant Michael Travis Darden, Jr., was found guilty of attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1)[1] and assault with a deadly weapon by means likely to cause great bodily injury (§ 245, subd. (a)(1), count 2) as alleged in a first amended information. The jury found true further allegations defendant used a deadly weapon, a knife (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). In a bifurcated proceeding, the defendant admitted allegations he had two prior serious felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serous felony convictions (§ 667, subd. (a)(1)).

On May 2, 2014, the trial court sentenced defendant to an indeterminate sentence on count 1 of 35 years to life. The court imposed a consecutive determinate term of three years for inflicting great bodily injury, one year for using a deadly weapon, and five years for each prior serious felony enhancement for a total determinate term of 14 years. On count 2, the court imposed an indeterminate sentence of 30 years to life. The court imposed a determinate sentence of three years for inflicting great bodily injury and consecutive terms of five years for each prior serious felony conviction for a total determinate sentence of 13 years. The court stayed defendant's sentence on count 2 pursuant to section 654.

Defendant contends there was insufficient evidence of premeditation and deliberation. Defendant argues the prosecutor committed misconduct by referring to criminal street gangs. Defendant argues the trial court abused its discretion by permitting a juror who had allegedly fallen asleep during closing argument to remain on the jury. Defendant contends the trial court abused its sentencing discretion by failing to strike one or both of his prior serious felony convictions and further argues his sentence is cruel and unusual under the state and federal Constitutions. In supplemental briefing, defendant

[1]Unless otherwise designated, statutory references are to the Penal Code.

contends, and plaintiff concedes, the trial court imposed an unauthorized indeterminate sentence on counts 1 and 2 in violation of the three strikes law. We agree with the parties the trial court's indeterminate sentence is unauthorized and will reverse the indeterminate sentence and remand the case for the trial court to enter a new indeterminate sentence and correct the abstract of judgment. The judgment is otherwise affirmed.

FACTS

Prosecution Evidence

Ryan Iskenderian is a life-long resident of Visalia. For a few months in 2012, Iskenderian leased a bar called the Pump House until there was a problem with the liquor license that Iskenderian attributed to the owner of the bar.[2] Although Iskenderian still had a lease in November, the Pump House was closed. Iskenderian worked for the bar about a year prior to leasing it.

The Pump House had its troublemakers who started fights. When this happened, the individuals were not allowed back into the bar. When James Beasely first started coming to the Pump House, Iskenderian had a positive relationship with him. After getting into too many fights week after week, however, Beasely was told he could not come back to the bar. Beasely was not happy that he could not patronize the Pump House. He came back on different occasions but was told he could not stay.

Kenny Conway came into the Pump House with others and ordered some drinks while Iskenderian was bartending. Iskenderian described Conway as being in his 50's, a biker-looking type with a grubby beard. When Iskenderian gave him his drink, Conway slapped the drink away and told Iskenderian it was not what he ordered. Iskenderian told Conway to leave. Iskenderian said something to Conway about being a drug addict. Iskenderian was good friends with Conway's uncle, who owned a tire shop across from Searcy's Bar and Café (Searcy's).

[2]Unless otherwise indicated, all dates refer to the year 2012.

Iskenderian had a friendly relationship with the owner of Searcy's. On November 11, Iskenderian went to Searcy's to see his girlfriend, Erica Cook, who was working at Searcy's that evening. The two were planning to travel the next day and Iskenderian did not hear from Cook after calling and sending her text messages. Iskenderian and Cook had been arguing that day. Iskenderian had already consumed more than a couple of beers prior to going to Searcy's.

Iskenderian parked behind Searcy's and entered through the back. Iskenderian walked past Conway, who asked whether Iskenderian remembered calling Conway a drug addict. Inside, Iskenderian saw Beasely as he walked toward Cook, who was at the bar. Iskenderian did not want any trouble with Beasely. Beasely placed himself between Iskenderian and the bar. Iskenderian is five feet 10 inches tall and weighed 170 pounds. He described Beasely as, "a big boy." Two weeks earlier when he was picking up Cook at Searcy's, Iskenderian encountered Beasely, who tackled Iskenderian. The two tussled until someone broke them up. Beasely told Iskenderian that if he could not go to Iskenderian's bar, Iskenderian could not go to a bar where Beasely was present. Iskenderian said he would not have gone to the bar if he knew Beasely was there.

Iskenderian could not remember if he was swearing at Cook when he approached the bar. Iskenderian described Beasely's manner as aggressive; Iskenderian did not want any trouble so he placed his hands up in the air. Iskenderian thought Beasely was going to hit him when he saw Conway over to the side by the bathrooms. Conway said something like, "'Yeah, that's him, get him.'" Iskenderian could tell someone was coming up behind him.

Iskenderian did not want a fight or any trouble. Very quickly Iskenderian got hit from behind. He never saw his attacker. At that moment, Iskenderian was facing Conway. Beasely did not hit Iskenderian. At first, Iskenderian did not know he had been stabbed until he made his way back to his pickup truck. Iskenderian told Cook he was going home. Inside his truck, however, he realized he had been stabbed.

Iskenderian drove to the hospital emergency room and called ahead because he was "bleeding like heck." The back of Iskenderian's jacket was like a balloon filled with blood. Iskenderian initially told the police someone else drove him to the hospital because he was afraid he was going to be charged with driving under the influence. At the hospital Iskenderian was taken into surgery. He was told without it, he would die. Iskenderian spent about 10 days in the hospital. He was in the intensive care unit for four or five days. Iskenderian was unconscious for an extended amount of time and has a scar going up the front of his stomach. Officer Julie Moore took photographs of Iskenderian's stab wounds, Iskenderian's blood-stained clothing, and blood stains to Iskenderian's keys and on the driver's side of Iskenderian's truck. These photos were admitted into evidence.

Don Edwards, the owner of Searcy's, had eight surveillance cameras installed weeks before Iskenderian was assaulted. Six of the cameras were operational and working properly on November 11. Cameras were located at the bar, in the café, and in the patio. The cameras recorded the date and time as they recorded video 24 hours a day to a computer.

Visalia police detective Ken Smythe was dispatched at 12:30 a.m. on November 12 to investigate a stabbing incident at Searcy's. Smythe found blood droplets near the jukebox in the bar. Smythe also noticed surveillance cameras positioned close to where witnesses told him the incident occurred. Edwards turned over the computer hard drive containing video recordings from the security cameras.

Smythe knew defendant, codefendant Ross Sharp, and Conway who lived across the street from Searcy's. Iskenderian identified Beasely and Conway in the video. In viewing the video recordings, Smythe concentrated on video feeds from channels 2, 3, and 5. Each camera had the time and date displayed. The time and date settings were identical for each video channel, but the time settings were not accurately set. The jury viewed the video as Smythe described the sequence of events. The attack in the bar is

depicted in opposite angles on channels 2 and 3. Channel 5 depicts Iskenderian staggering away from Searcy's after being attacked. In addition to reviewing Smythe's testimony, we have also watched the video from channels 2, 3, and 5.

Sharp had tattoos on his neck and was wearing a black T-shirt without a cap. Defendant, who was with Sharp during most of the video, was wearing a ball cap and a necklace with a pendant on it. Beasely was wearing a plaid button-down short sleeved shirt and a cap. Conway appeared as an older White male with shoulder-length gray hair and was identified by Smythe in channels 2, 3, and 5 as the jury viewed the video. Iskenderian can be seen in channels 2 and 3 walking into the bar from the patio, and in channel 5 he is seen stumbling through the patio as he exited the bar. Iskenderian wore a cap and light jacket that he described as satin.

Channel 2 of the video showed Sharp and defendant entering the bar. Beasely walked into the bar and then out of view. After a few minutes, Iskenderian entered the bar and had a conversation with Beasely. Sharp began to hit Iskenderian with his fists before defendant, holding a knife, began to stab Iskenderian. Defendant was holding a cigarette in his other hand. Iskenderian exited through a south facing door onto the patio. Sharp and defendant exited through a north facing door.

The video feed from channel 3 was from the opposite side of the room. It showed Iskenderian talking to Beasely and putting up his hands in a gesture suggesting he did not want a confrontation. Conway entered the bar and met with Sharp and defendant. At three minutes and fifty-six seconds after the start of the video, defendant pulled a brightly colored object from his right front pants pocket that turned out to be a knife. Defendant extended the knife after pulling it from his pocket. Conway stepped up close to the action. Iskenderian began to walk toward the patio exit of the bar and placed his hands up in the air as he walked past Beasely. Sharp stepped in between Iskenderian and Beasely and started punching Iskenderian in the face, causing Iskenderian to fall to the floor. Sharp jumped onto Iskenderian and continued to punch him. At four minutes and

twenty-three seconds, as Iskenderian struggled to get up, defendant began to thrust the knife he was holding in his right hand into Iskenderian several times. Conway stood very close to the victim and the attackers and appeared to strike Iskenderian once or twice in the head. Another patron intervened and stopped the assault.

After the assault, channel 5 depicted Iskenderian staggering out of the bar through the patio. Conway and Beasely chased him out the door. A minute or so after Iskenderian left the bar, Sharp and defendant returned to the patio. Sharp and Beasely exchanged a congratulatory handshake. Defendant playfully put his arm around Conway's head and apparently said something in his ear. The four men appeared excited over what had just occurred. After some time had passed, video from channels 2 and 3 depict Sharp talking to Conway. Sharp was wearing a different shirt and a ball cap.

Later on the day of the assault, Sharp admitted to investigators that he was at Searcy's during the attack. On December 4, defendant was arrested at a local FoodMaxx. Defendant had a knife in his front pants pocket. He was wearing the same necklace and pendant he had on during the assault of Iskenderian. Defendant was also wearing the same cap he had on while he stabbed Iskenderian. As defendant was being arrested, Conway drove by slowly to see what was happening. When police executed a search warrant of defendant's home, they found several folding knives in his bedroom.

Smythe interrogated defendant after his arrest. Defendant waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). A recording of the questioning was played for the jury. Defendant denied being at Searcy's on November 11, or ever going there. Defendant said he was not familiar with Sharp. Defendant told Smythe he had "adopted a hermit life." Defendant also denied knowing Conway.

Defendant made a collect phone call to a female while in custody. A recording of the call was played for the jury as exhibit 18. Defense counsel stipulated the tape recording was of his client. Defendant told the female he was aware friends of his had seen the surveillance video. The female told defendant the friends had seen the video.

When defendant asked the female what the acquaintances thought of it, the female replied they could see defendant stabbing the victim. Defendant responded, "Yeah, hate it when that happens."

Defense Evidence

Defendant was convicted in 2002 of a felony offense of moral turpitude. Defendant testified in his own behalf that his marriage broke up in 2011; he took the breakup hard and began to drink heavily. On November 11, defendant bought a 30-pack of beer and a bottle of Southern Comfort. After heavily consuming the alcohol, defendant explained "things start[ed] getting fuzzy." Defendant vaguely remembered walking by himself to Searcy's from his home.

Defendant admitted he knew Sharp and he had been "flat lying" when he told police he did not know him. Defendant explained he did not want to get into trouble and had a long history of distrusting law enforcement. During cross-examination, defendant further admitted he lived with Sharp and Sharp's father. Defendant saw Sharp and other acquaintances at Searcy's, played pool, and began drinking beers "hand over fist." Defendant denied personally knowing Beasely or Conway, though he had seen Conway around the bar. Defendant said he had been to Searcy's a time or two but it was not one of his "regular jaunts." During cross-examination, defendant said he put his hand on Conway's head and was friendly to him because they had partied together that evening.

Iskenderian appeared to defendant to look upset about something when he entered the bar and entered "like [a] bull in a china shop." Defendant did not know Cook was Iskenderian's girlfriend. Defendant explained the video did not show everything because there was a blind spot. According to defendant, there was a set table by the door between the bar and the patio not seen in the video and Iskenderian "plowed through that thing like a John Deere 7200." Iskenderian had an expression on his face that looked to defendant like he did not want anyone monkeying with him.

Although defendant said he did not remember events that evening very clearly, he did remember Iskenderian swearing at Cook and calling her names that "weren't on her birth certificate." Defendant conceded there was a confrontation between Sharp and Iskenderian. Defendant did not know what came over him, but he became upset with Iskenderian and "wanted to give him a good ol' Alabama-style behind whippin'." Defendant said he "went up in there and I'm like I'm gonna get his butt like a backhoe, and I went up in there. The next thing, I found myself cutting on the boy, I backed off. I was like, no. And I backed on up. By then, it was all over but the shouting. I done poked him a couple good times. Nary once did I have intentions of doing more than hurting him, though. I didn't like the fact of what was going on."

Defendant is six feet two inches tall and weighed 272 pounds. Defendant could not remember which of his knives he was carrying the evening of the assault, but thought it would have been a standard pocketknife with a blade of three and a half inches.

Defendant said initially he was trying to get away from Iskenderian, but a scuffle broke out and he impulsively got involved. Defendant said he did not see who started the scuffle. Defendant claimed he was unable to think farther than his nose and acted rashly and impulsively. Defendant said he backed off after stabbing Iskenderian and was "flabbergasted" at his conduct. Defendant admitted he could have been smoking during the attack. Defendant reiterated that he did not intend to kill Iskenderian.

Defendant admitted he made the call from the jail that was recorded and played to the jury. According to defendant, his statement in reference to being captured on video stabbing the victim was not that he was caught, but he hated the fact the incident happened.

Defendant admitted he overreacted during a bar fight. He was unaware Iskenderian suffered injury to his liver. Defendant denied remembering where he stabbed Iskenderian or that inflicting multiple stab wounds to someone's torso could be fatal.

Defendant's honest opinion was he did not believe "hitting the love handles could kill someone." Defendant denied Beasely told him to stab Iskenderian.

During cross-examination, however, defendant was asked if he "just coldheartedly took a knife out of [his] pocket and shoved it into … Iskenderian's back." Defendant replied, "Unfortunately that's true, sir." Defendant conceded he intentionally placed the knife he used to stab Iskenderian back into his pocket, stood back, and acted as though nothing had happened. Defendant also conceded failing to give an accurate statement of the truth and letting Sharp "hang for the whole thing." Defendant admitted that for Sharp, the incident was a bar fight, but for defendant it was not, because he ended the fight by putting his finishing touch on it.

Erica Cook testified she was bartending at Searcy's on November 11, was dating Iskenderian, and broke up the fight. Iskenderian called Cook several times that day and seemed intoxicated to her. Despite the number of calls, Cook did not have conversations with Iskenderian. Iskenderian appeared angry to Cook when he arrived at Searcy's. Cook could not remember if Iskenderian swore at her. Cook described her relationship as sometimes volatile and involving fights. The two had discussed going on a trip together. Cook said the bar was busy that night and the music was loudly playing from the jukebox.

Cook said Conway was at the bar that night, but she did not hear his conversations. After the fight, Cook helped escort Iskenderian to the parking lot. Iskenderian never told Cook he had been stabbed. No one else mentioned a stabbing. Cook returned to her job after the incident.

Officer Moore questioned Iskenderian at the hospital. Iskenderian told Moore that Erica Cook and a bar patron named James could provide information about what happened. Iskenderian was aware of the security monitoring system in the bar, but was worried the video would be destroyed. When Moore questioned him, Iskenderian was on

a gurney bleeding profusely. They did not have long to talk before Iskenderian was rushed into surgery; Iskenderian had difficulty answering Moore's questions.

DISCUSSION

1. Substantial Evidence of Premeditation and Deliberation

Defendant contends there was insufficient evidence he premeditated and deliberated an attempted murder of Iskenderian. Defendant describes his actions as based on rash impulse, his act of carrying a knife did not show preplanning, and defendant had no history with Iskenderian or motive to kill him. We disagree.

A. Attempted Premeditated and Deliberate Murder

"In assessing the sufficiency of the evidence supporting a jury's finding of premeditated and deliberate murder, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1068-1069.) "When the circumstances reasonably justify the jury's findings, a reviewing court's opinion that the circumstances might also be reasonably reconciled with contrary findings does not warrant reversal of the judgment." (*Id.* at p. 1069.) Reviewing courts presume all facts in support of the judgment the trier of fact could have reasonably deduced from the evidence. A reviewing court does not reweigh the evidence or reevaluate a witness's credibility. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

Attempted murder requires the specific intent to kill the alleged victim coupled with the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Stone* (2009) 46 Cal.4th 131, 136.) Deliberate and premeditated first degree murder requires more than a showing of intent to kill. Deliberation refers to the careful weighing of considerations in forming a course of action. Premeditation means the defendant has thought over the crime in advance. Premeditation and deliberation,

however, can occur in a brief interval. The test is one of reflection, not of time. The perpetrator's thoughts may follow with great rapidity. Cold and calculated judgment can be arrived at quickly. (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1069.)

The Supreme Court in *People v. Mendoza* noted its decades-old decision in *People v. Anderson* (1968) 70 Cal.2d 15 distinguished the three types of evidence showing premeditation and deliberation: planning activity, preexisting motive, and the manner of killing. *Mendoza* noted, however, *Anderson* did not establish an exhaustive list excluding all other types and combinations of evidence that could support a finding of premeditation and deliberation. (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1069.)

In *Mendoza*, the defendant did not initiate an encounter with an officer, but quickly formulated a plan to kill the officer as soon as the defendant learned the officer was going to conduct a weapons search. Planning was demonstrated by the defendant using another detainee as a shield and approaching the officer without attracting attention. Preexisting motive was also quickly formed because as the officer approached the defendant and his friends, the friends told defendant to run away but he chose instead to stay and later attack the officer. The manner of killing, a single shot to the head, further evidenced the defendant's intent to kill. (*People v. Mendoza*, *supra*, 52 Cal.4th at pp. 1071-1072.)

In *People v. Harris* (2008) 43 Cal.4th 1269, 1286-1287, our high court found ample time for premeditation and deliberation when the victim walked a short distance from a door to a service window and the defendant plunged a knife into the victim's heart. In *People v. Brady* (2010) 50 Cal.4th 547, 563-564, the Supreme Court found the defendant could form the intent to kill a police officer within the short interval between when the officer shined a light into the defendant's car and then approached the defendant, who was in illegal possession of a firearm.

B. Planning Activity

The sequence of events here unfolded very quickly, but not so fast that defendant was without sufficient time to premeditate and deliberate an intent to kill Iskenderian. Planning activity was demonstrated directly and circumstantially. Iskenderian heard Conway say, "that's him," identifying Iskenderian moments prior to the attack. There was evidence Beasely and Conway had prior grudges with Iskenderian and were friendly with defendant and Sharp during and after the attack.

In addition to this circumstantial evidence, defendant can be clearly seen in video images pulling out a knife, extending it, and holding it to his side 30 seconds prior to his proceeding to repeatedly stab Iskenderian. Defendant waited until Sharp knocked Iskenderian to the ground before stabbing him. There was substantial evidence from which a jury could reasonably conclude defendant planned his attack.

C. Preexisting Motive

There is also circumstantial and direct evidence of a preexisting motive. As already noted, defendant and Sharp were told who Iskenderian was immediately prior to the attack. After the attack, defendant and Sharp appeared jovial. Defendant playfully put his hand on Conway's head and appeared to say something into Conway's ear.

Defendant described Iskenderian as coming into the bar like a bull in a china shop and cursing at Cook. Although defendant reiterated several times during his testimony he did not know Iskenderian and did not intend to kill him, defendant unequivocally stated he became upset with Iskenderian and "wanted to give him a good ol' Alabama-style behind whippin'." Defendant further said he "went up in there and I'm like I'm gonna get his butt like a backhoe, and I went up in there." Defendant admitted stabbing Iskenderian multiple times. Trying to put a positive gloss on and to minimize the seriousness of his actions, defendant said, "I done poked him a couple good times."

During cross-examination defendant was asked if he "just coldheartedly took a knife out of [his] pocket and shoved it into … Iskenderian's back." Defendant replied, "Unfortunately that's true, sir." Defendant admitted he wanted to seriously hurt

Iskenderian and acted coldheartedly. From defendant's own admissions and the circumstances surrounding the assault, a jury could reasonably conclude he harbored malice toward Iskenderian and formed a motive to harm Iskenderian prior to stabbing him. The jury could also reasonably find defendant had enough time to plan and formulate the motive to premeditate and deliberately kill Iskenderian.

D. Manner of Crime

The manner in which defendant attempted to kill Iskenderian further demonstrated premeditation and deliberation. Defendant deliberately unfolded his knife about 30 seconds prior to stabbing Iskenderian. Defendant waited not only until Sharp started to pummel Iskenderian with his fists, but until Iskenderian had fallen to the ground with Sharp on top of him before defendant began his stabbing spree. Defendant's attack damaged Iskenderian's liver and caused such severe blood loss that Iskenderian would have died without medical intervention.

Defendant's description of his conduct was not exculpatory. There was a cool detachment and cavalier attitude defendant displayed to the jury as he described his nearly fatal stabbing of the victim. Defendant's nonchalant attitude toward the stabbing was further evident in the video of the attack where defendant is seen casually holding a cigarette in one hand as he stabbed the victim with his other, and later acting triumphant when he met back with Beasely and Conway.

There was substantial evidence to support the jury's conclusion defendant attempted to kill Iskenderian with premeditation and deliberation.

2. Prosecutorial Misconduct

A. Introduction

During motions in limine, the trial court denied the prosecutor's motion to admit evidence, based on jail calls, of defendant's involvement with gangs as a motive for the offense. The court explained it was too late to have a law enforcement officer testify

concerning this information because the defense had no notice or opportunity to secure its own expert.

During cross-examination, the prosecutor asked defendant if he was involved with gangs. Defense counsel's objection to this question was immediately sustained and defendant did not answer the question. Outside the presence of the jury, defense counsel's motion for a mistrial based on prosecutorial misconduct was denied. The trial court noted it was upset with the prosecutor for asking the question, especially in light of the court's in limine ruling. The court found, however, because there was no testimony, there was nothing before the jury to prejudice it.

Defendant now contends he was deprived of his Fourteenth Amendment right to due process because of the prosecutor's misconduct. Defendant characterizes the prosecutor's conduct as prejudicial to such a degree that he did not receive a fair trial. We do not find the alleged misconduct by the prosecutor to be so egregious to have violated defendant's right to due process.

B. Analysis

A prosecutor engages in misconduct when he or she violates a court ruling by attempting to elicit inadmissible evidence in violation of a court order. A determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct. A defendant's conviction will not be reversed for such misconduct, however, unless it is reasonably probable a result more favorable to the defendant would have been reached without the misconduct—the standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

We are unpersuaded by defendant's attempt to cast the prosecutor's conduct here as egregious. There is no doubt the prosecutor attempted to ask defendant a question about his gang membership that the trial court had ruled inadmissible during pretrial motions. But defense counsel's immediate objection to the question was sustained by the

trial court and defendant never answered the question. Defendant's reliance on *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 is unpersuasive because in *Albarran* there were facts unrelated to the allegations against the defendant admitted concerning gang threats to the police as well as identifying other gang members and unrelated crimes. In *Albarran*, unlike the instant action, an ongoing pattern of evidence was admitted with no legitimate purpose in the trial.

A prosecutor's misconduct only violates the federal Constitution when it is so egregious it infects the trial with such unfairness as to cause the conviction itself to be a denial of due process. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) A prosecutor's brief reference to an excluded witness in response to a question does not constitute an egregious pattern of misconduct. (*Ibid.*) The prosecutor's improper question seeking inadmissible opinion testimony from an expert concerning a defendant's capacity to form intent also does not amount to an egregious pattern of misconduct rendering the verdict unfair. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) The prosecutor's unanswered question here is more directly analogous to *Prieto* and *Smithey* than to *Albarran*. There was no pattern of prosecutorial misconduct rising to the level of a constitutional denial of due process.

Furthermore, the trial court instructed the jury with CALCRIM No. 222.[3] This instruction unequivocally advises the jury to consider only the testimony of witnesses and

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[3]In relevant part, the jury was instructed as follows with CALCRIM No. 222:

"'Evidence'" is the sworn testimony of witnesses, the exhibits admitted into evidence and anything else [the court] told you to consider as evidence.

"Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

"During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. [The court] ruled on the objections according to the law. If [the court] sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why [the court] ruled as [it] did. If

exhibits as evidence; not to consider a question by counsel to be evidence; not to consider something true because an attorney asked a question suggesting it was true; and not to speculate what the answer to a question might have been in the absence of the court sustaining an objection to the question. Each of these instructions is applicable here and in combination clearly and unambiguously instruct the jury to disregard the prosecutor's question of defendant concerning gang membership. Jurors are credited with intelligence and common sense. We presume they generally understand and follow the instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670; *People v. Holt* (1997) 15 Cal.4th 619, 662.)

Defendant has failed to establish it is reasonably probable a result more favorable to him would have been reached without the prosecutorial misconduct. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1133.)

3. Inattentive Juror

A. Introduction

The trial judge received a note from Juror No. 1786281 stating Juror No. 1759140 (the Juror) may not be taking his duties seriously because he had fallen asleep during closing argument and may have already made up his mind. Defendant contends his right to due process was violated because he was not judged by an impartial jury. We reject this contention.

After receiving the note, the court noted its observation that the Juror closed his eyes briefly during the closing arguments and then opened them again. The court thought the Juror may have been closing his eyes to concentrate, and it conducted a hearing to determine what had happened. The Juror told the court he fell asleep a couple of times, but did not miss anything and had not yet decided the case or reached a conclusion about

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[the court] ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose."

it. The Juror complained the courtroom was warm and requested the air conditioning be turned down. The court sympathized with the Juror but explained the ventilation system was very old and the county did not have funds for a new one.

After a recess, the Juror told the court he was angry because the court's questions implied he was not intelligent enough to deliberate with others, and during the recess he became angrier with the situation. The Juror indicated he wanted to be dismissed. The Juror felt insulted by the earlier hearing and thought he was considered to be simple minded. The Juror again admitted he probably nodded off and apologized. The Juror thought his continued services could be an injustice to all of the parties. The Juror noted the day before had been grueling. He felt slighted because he was the only juror asked about his demeanor.

Defendant's counsel asked the Juror if he could still judge the case and be fair. Defense counsel told the Juror that if he left, counsel would understand, "but if you feel like you can be fair, I think you should be able to see this case to fruition." The Juror replied he had been willing to take everything into consideration, but the earlier hearing "kind of stopped me on my tracks."

The trial court told the Juror he had obviously been offended. The court apologized for this and asked the Juror if he thought he could "go back and fairly judge this case and deliberate with the other jurors?" The Juror again acknowledged his anger, but asked the court if it would be willing to take a chance on him. The Juror said he was willing to give it a try, but did not want to make any promises. The court told the Juror to go back and give it a try. The Juror said he would and if he had "a problem I can come back and tell you?" The court agreed and the Juror thanked him.

B. Analysis

A court may discharge a juror for good cause under section 1089. A juror who violates his or her oath and the court's instructions is guilty of misconduct. We review a trial court's decision to discharge a juror under an abuse of discretion standard; we will

uphold the court's decision if the record supports the juror's disqualification as a demonstrable reality. This test requires a showing the court, as trier of fact, relied on evidence that, in light of the entire record, supported its conclusion disqualification was established. In determining whether the trial court's conclusion is manifestly supported by the evidence on which the court relied, we consider not just the evidence itself, but also the record of the reasons the court provided. In doing so, we do not reweigh the evidence. We further defer to the trial court's credibility assessments as they are based on firsthand observations unavailable to us on appeal. (*People v. Williams* (2015) 61 Cal.4th 1244, 1262.)

Trial courts may remove a juror who has become ill or, upon other good cause shown, is found to be unable to perform his or her duty. (*People v. Duff* (2014) 58 Cal.4th 527, 560.) In *People v. Bradford* (1997) 15 Cal.4th 1229, 1348, a juror had been observed sleeping on two days during trial. Our Supreme Court recognized "the soporific effect of many trials when viewed from a layman's perspective," but noted reported cases uniformly decline to order a new trial in the absence of convincing proof that a juror, or jurors, were actually asleep during material portions of the trial. (*Id.* at p. 1349.)

Here, there has been no showing the Juror was unable to perform his duties as a demonstrable reality. (*People v. Bradford, supra*, 15 Cal.4th at p. 1351.) Although the Juror was angry for being singled out and questioned about dozing off during closing argument and for prejudging the case, he ultimately explained he had not reached a conclusion about the verdict and was willing to deliberate with his fellow jurors. The Juror further told the court that if he was having any difficulty with deliberations, he would inform the court. Furthermore, there is no evidence the Juror missed a substantial portion of the trial. He dozed off during closing arguments, but not for a significant period of time or for a material portion of the trial. The trial court observed the Juror's

eyes were closed briefly and then he opened them again. Based on the record, we do not find the trial court erred in permitting the Juror to remain on the jury.[4]

4. Failure To Strike Prior Convictions

A. Background

Defendant contends the trial court abused its sentencing discretion for failing to strike one or more of his prior convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Defendant has failed to show the trial court abused its sentencing discretion under *Romero*.

Defendant filed a written motion requesting the trial court to exercise its discretion to strike one or more of his prior convictions pursuant to section 1385 and *Romero*. According to the probation officer's report, defendant's criminal record began as a juvenile. Defendant had four adjudications for petty theft, exhibition of a deadly weapon, battery with serious bodily injury, vandalism, burglary, and receiving stolen property. Defendant was committed to the former California Youth Authority in 1994 and returned there three more times.

As an adult, defendant had felony convictions in 1998 for receiving stolen property and in 1999 for theft or taking of a vehicle. He also violated his parole twice. In 2001 and 2002, defendant had felony robbery convictions and violated his parole in 2006 and was ordered to finish his prison term. Defendant also affiliated with the Skinheads, a White supremacist criminal street gang.

Defendant testified at trial he had been married, had three children, worked as a welder and as a bouncer. Defendant tried to support his family when the economy went bad but could not handle the stress, which led to the breakup of his marriage. Defendant was the vice president of the Ag Mechanic Club at the College of the Sequoias during the 2006–2007 academic year. He earned a student achievement award and student worker

[4]Because we find no error, we do not reach the People's argument this issue was waived by defense counsel's failure to object or defendant's contention defense counsel was ineffective for failing to object to the Juror remaining on the jury.

award. In 2009, defendant graduated with a vocational certificate of completion in agricultural technology and an associate of science degree from the College of the Sequoias.

At the sentencing hearing, defense counsel asked the trial court to strike at least one of defendant's prior serious felony convictions because otherwise defendant would serve a life sentence. In denying defendant's request to strike his prior serious felony convictions, the trial court stated it was exercising its discretion and found it would not be in the interests of justice to strike one or both of the strike allegations. The court noted defendant's crime was "one of substantial violence."

B. Analysis

We review a ruling upon a motion to strike a prior felony conviction under a deferential abuse of discretion standard. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The defendant bears the burden of establishing the trial court's decision was unreasonable or arbitrary. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) We do not substitute our judgment for that of the trial court. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*Ibid*.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Defense counsel made a written request pursuant to *Romero* and also argued at the sentencing hearing for the application of *Romero*. The trial court was well aware of its discretion to strike the prior serious felony convictions pursuant to *Romero* but declined to do so, noting the serious and violent nature of defendant's crime.

Defendant characterizes his juvenile record as involving mostly minor offenses. In doing so, however, defendant ignores the adjudication for battery causing great bodily

injury. Defendant then argues his strike offenses, which included two felony robberies, were remote in time, and during the intervening time defendant describes himself as a productive member of society. Defendant downplays his affiliation with a White supremacist gang, arguing his affiliation is less serious than gang membership.

Defendant ignores the fact he was unsuccessful in remaining out of trouble and reoffending as a juvenile. Defendant was sent back to the youth authority three times. As an adult, he failed on felony parole and was sent back to finish his term in prison in 2006. Although defendant went back to school, obtained employment, married, and started a family, he failed to remain a productive member of society. Defendant struggled to remain employed, broke up with his wife, became involved with a gang, and admitted spending too much time drinking alcohol.

The instant offense could have been just another bar fight, but due to defendant's direct conduct, it nearly led to the victim's death. Even if the victim entered the bar in an angry manner and cursed at his girlfriend, this conduct was insufficient to provoke defendant into his vicious attack. Defendant's nonchalant, cavalier, and indifferent attitude during and after stabbing the victim adds another chilling aspect to this offense. "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310, quoted with approval in *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

The record in this case shows the trial court understood its discretionary authority and weighed all the competing facts to reach a reasonable conclusion. After evaluating the entirety of that information, the court drew its ultimate conclusion and declined to exercise its discretion to strike one or more of the prior serious felony convictions. In view of these facts and circumstances, defendant has failed to show abuse of discretion.

(See *People v. Carmony*, *supra*, 33 Cal.4th at pp. 378-380; *People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

5. Cruel and Unusual Punishment

A. Introduction

Defendant contends his indeterminate sentence constitutes cruel and unusual punishment under the California and United States Constitutions for what defendant characterizes as "a bar fight." Defendant argues his sentence is disproportionate to more serious offenses. We do not find defendant's indeterminate sentence constitutes cruel and unusual punishment.

Defendant further argues that to the extent his trial counsel failed to raise this issue, if we apply the doctrine of forfeiture, his trial counsel was ineffective. We note in his written motion to the trial court, defense counsel discussed the disproportionality of his client's sentence more than once, citing our Supreme Court's seminal case, *In re Lynch* (1972) 8 Cal.3d 410, 425-427. Because defendant's trial counsel directly raised the issue of the constitutionality of his client's sentence, we do not find forfeiture applicable. The People also do not raise forfeiture. We therefore find no legal or factual basis to find trial counsel was ineffective and do not discuss that point.

B. Analysis

Article I, section 17 of the California Constitution sets forth three factors for courts to consider when analyzing whether a sentence is cruel or unusual: (1) the degree of danger the offender and the offense pose to society; (2) how the punishment compares with punishments for more serious crimes; and (3) how the punishment compares for the same offense in other jurisdictions. (*People v. Dillon* (1983) 34 Cal.3d 441, 479-482; *In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427; *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1310.) The Eighth Amendment to the federal Constitution also contains a narrow proportionality principle reserved for extreme sentences that are grossly disproportionate to the offenses committed by a defendant. (*Ewing v. California* (2003) 538 U.S. 11, 20.)

C. Danger Offender Poses to Society

The first factor applied to the *Lynch* analysis of whether a sentence is cruel or unusual is the degree of danger the offender and the offense, or offenses, pose to society. Defendant's attack on Iskenderian was vicious and callous. Defendant had caused great bodily injury as a juvenile, committed two robberies as an adult, and associated with a criminal street gang. The court in *Andrade*, for instance, did not find a sentence of 195 years disproportionate, shocking, or inhumane for a violent sex offender who lacked a criminal history but who, nevertheless, committed his crimes on young, vulnerable women, threatened his victims, and claimed an affiliation with law enforcement to avoid detection. (*People v. Andrade*, *supra*, 238 Cal.App.4th at p. 1310.) It was defendant's "conduct, not his sentence, that was cruel and unusual." (*People v. Wallace* (1993) 14 Cal.App.4th 651, 666.)

D. Proportionality of Sentence to Other Crimes

Comparing defendant's sentence to other offenses with indeterminate life sentences, we observe that lengthy noncapital sentences have been upheld in a variety of other sentencing scenarios. A defendant convicted of violating the three strikes law for being a felon in possession of a handgun did not receive a sentence of 25 years to life in violation of the state or federal Constitution. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 819-831.) The one strike law for sex offenses under section 667.61 mandating an automatic minimum sentence of 25 years to life has been upheld against constitutional challenges. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 803-812; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1232 [upholding sentence of 135 years pursuant to the one strike law].) A sentence of over 283 years for multiple sex offenses not charged under the one strike law has overcome a challenge based on cruel or unusual punishment. (*People v. Wallace*, *supra*, 14 Cal.App.4th at pp. 666-667.)

In *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 842-846, another defendant without a criminal record committed aggravated mayhem (by slashing the victim's face to the point of being unrecognizable), attempted murder, and first degree burglary. He

received a sentence of two concurrent life terms with the possibility of parole plus a determinate sentence of four years. (*Id*. at pp. 827-831.) The *Szadziewicz* court did not find the defendant's sentence disproportionate or cruel and unusual pursuant to the Eighth Amendment. (*Szadziewicz*, *supra*, at pp. 844-846.)

Defendant cites federal authorities that found disproportionality in three strikes sentences imposed by California courts. We note federal decisions are not binding on this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Even if we found these authorities persuasive, they are for offenses less serious and factually inapposite to the instant action. (*Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, 878-889 [28 years to life for technical violation of sex registration law found disproportionate]; *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, 966-969 [26 years to life for perjury on driver's license application overturned]; *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 758-775 [25 years to life grossly disproportionate for theft of $200 video recorder]; *Banyard v. Duncan* (C.D.Cal. 2004) 342 F.Supp.2d 865, 873-887 [25 years to life for possession of rock cocaine for personal use overturned].)

The Eighth Amendment to the United States Constitution forbids extreme sentences "grossly disproportionate" to the crime committed. (U.S. Const., 8th Amend.) However, the federal and state courts, including recent decisions by the United States Supreme Court, have consistently rejected claims that life terms imposed on recidivists under these circumstances violate the constitutional ban on cruel and unusual punishment contained in the Eighth and Fourteenth Amendments. (*Ewing v. California*, *supra*, 538 U.S. at p. 29 ["In weighing the gravity of (defendant)'s offense, we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments … in the legislature's choice of sanctions"]; see *Lockyer v. Andrade* (2003) 538 U.S. 63; *Harmelin v. Michigan* (1991) 501 U.S. 957, 965; *Rummel v. Estelle* (1980) 445 U.S. 263, 284; *People v. Cooper*, *supra*, 43 Cal.App.4th at p. 820; *People v. Kinsey* (1995) 40

Cal.App.4th 1621, 1630-1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137.)

Defendant's long history of recidivism dates back to when he was a juvenile. We do not agree with his depiction of his juvenile or adult offenses as relatively minor. As both a juvenile and an adult defendant failed to stay out of custody because he committed new offenses or violated his parole. The current offense was extremely serious, and defendant's conduct clearly went far beyond a mere bar fight.

We therefore reject defendant's argument his sentence was disproportionate compared to other sentences and note if the victim had not driven himself immediately to the hospital, defendant would have been facing charges for murder rather than attempted murder. We conclude the second factor for determining whether a sentence is cruel or unusual—how other offenses are punished in California—does not demonstrate defendant's sentence was cruel or unusual.[5] The trial court did not abuse its discretion in imposing an indeterminate sentence.

6. Sentencing Error

In supplemental briefing, defendant contends, and the People concede, the trial court committed sentencing error in imposing an indeterminate sentence of 35 years to life on count 1 and 30 years to life, stayed, on count 2. We agree and will remand for the trial court to impose a sentence of 25 years to life on count 1 and a stayed sentence of 25 years to life on count 2.

In calculating defendant's sentence, the probation officer added up the sentences on the enhancements on count 1, which totaled 14 years, doubled them to reach a term of 28 years, and then added the base term for attempted murder (§§ 664, 187) of seven years to achieve a sentence of 35 years to life. On count 2, which was stayed, the probation

[5]The third factor in constitutional analysis employed by California courts—how the punishment compares for the same offense in other jurisdictions—need not be reviewed under the facts of this case. (See *People v. Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38; *People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 846.)

officer followed a similar process by taking the total of defendant's enhancements, 13 years, doubling it to 26 years, and adding the base term of four years for assault likely to cause great bodily injury to achieve a sentence of 30 years to life. The trial court imposed these sentences, apparently following the probation officer's recommendation.

The probation officer and the court were applying section 1170.12, subdivision (c)(2)(A)(iii) to calculate defendant's sentences on counts 1 and 2. The error was in doubling the length of the enhancements in the calculation of the prison term. We agree with the parties the sentence on count 1 would have been 14 years for the enhancements plus the base term of seven years for attempted murder for a total sentence of 21 years to life. Count 2 would have yielded a sentence of 17 years to life. (See §§ 1170.12, subd. (c)(2)(A)(iii), 667, subd. (e)(2)(A)(iii).)

The prison terms applicable under section 1170.12, subdivision (c)(2)(A)(iii), however, are lower than the prison term of 25 years to life. Defendant had committed two prior serious felonies qualifying as strikes. Under section 1170.12, subdivision (c)(2)(A)(ii), his sentence should have been 25 years to life for counts 1 and 2 (with count 2 being stayed pursuant to § 654) plus determinate sentences for the enhancements (with the enhancements on count 2 also being stayed). (See § 667, subd. (e)(2)(A)(ii).) Under the terms of the statute, the trial court had to impose the greater of the two possible sentences, or 25 years to life. (See *People v. Williams* (2004) 34 Cal.4th 397, 403; *People v. Miranda* (2011) 192 Cal.App.4th 398, 414-417.)

We will, therefore, remand the case for the trial court to impose the proper sentence set forth by the three strikes law.

DISPOSITION

The court's indeterminate sentences on counts 1 and 2 are reversed. The case is remanded for the trial court to impose sentences of 25 years to life on each count and to then impose the consecutive determinate sentence on the enhancements found true on count 1 of 14 years, and to impose the consecutive determinate sentence of 13 years for

the enhancements found true on count 2. The court shall stay defendant's sentence on count 2, as well as the enhancements alleged as to that count. The court shall also prepare an amended abstract of judgment reflecting these changes and forward it to the appropriate authorities. The judgment is otherwise affirmed.

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PEÑA, J.

WE CONCUR:

_____
HILL, P.J.

_____
LEVY, J.